

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JACK DEMPSEY TILLMAN, JR.,

Defendant-Appellant.

UNPUBLISHED

June 29, 2004

No. 245442

Saginaw Circuit Court

LC No. 02-021838-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TERRENCE VERNELL WILLIAMS,

Defendant-Appellant.

No. 245443

Saginaw Circuit Court

LC No. 02-021840-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SAEJAR DEONTE PARKER,

Defendant-Appellant.

No. 245894

Saginaw Circuit Court

LC No. 02-021841-FC

Before: Hoekstra, P.J., and O’Connell and Donofrio, JJ.

PER CURIAM.

Defendants separately appeal of right following a joint jury trial that resulted in criminal convictions for each of them. Defendant Jack Dempsey Tillman, Jr., was convicted of conspiracy to commit murder, MCL 750.157a and MCL 750.316(1)(a), assault with intent to

commit murder, MCL 750.83, third-degree fleeing and eluding, MCL 750.479a(3), obstructing an officer, MCL 750.479, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to prison terms of life for the conspiracy conviction, 29 to 50 years for the assault conviction, 3 to 5 years for the fleeing and eluding conviction, 15 months to 2 years for the resisting or obstructing conviction, and two years for the felony-firearm conviction. The first four of these sentences are concurrent with each other, and the felony-firearm sentence is consecutive to the conspiracy and assault sentences, but concurrent with the sentence for obstructing an officer and the sentence for fleeing and eluding.

Defendant Terrence Vernell Williams was convicted of conspiracy to commit murder, felon in possession of a firearm, MCL 750.224f, and two counts of felony-firearm. He was sentenced concurrently to life imprisonment for the conspiracy conviction, and 42 to 90 months' imprisonment for the felon in possession conviction. He was also sentenced to two years' imprisonment for each of the felony-firearm convictions, to run concurrently with each other but before and consecutively to the other terms.

Defendant Saejar Deonte Parker was convicted of felon in possession of a firearm and felony-firearm. He was sentenced as an habitual offender, second offense, MCL 769.10, to serve consecutive terms of two years' imprisonment for the felony-firearm conviction, and 28 to 90 months' imprisonment for the felon in possession conviction. We affirm.

Defendants' convictions arose from a shooting that took place in the early morning hours of May 14, 2002, in Saginaw. The victim was sitting in his car in his driveway when he noticed a white car drive past him. A few minutes later, he heard gunshots and saw a tall man shooting at him. He crouched down in the car but was still struck by four bullets. A neighbor who heard the gunshots looked out his window seconds after the shooting stopped and saw a man dressed in dark clothing enter a white car on its passenger side and speed away. A police officer routinely patrolling the victim's block heard the gunshots. Moments later he spotted a white car driving erratically and aggressively, so he pursued it. The chase intensified, culminating in speeds well over sixty miles per hour through residential streets, and ended when the white car crashed into a tree and telephone pole. Defendant Jack Tillman opened the driver's door and ran, but was later apprehended nearby. Defendant Williams tried to climb out of the open rear passenger side window, but the officer immediately pinned him to the ground. Defendant Parker went for the driver's door from the back seat, but never made it out of the car. After a lengthy scuffle, officers also apprehended the passenger who was riding in the front seat, Elijah Tillman.¹

Several hours later, police found a Luger pistol along the right side of the chase route. The scuffed pistol had a plug of dirt in the barrel and left a divot nearby, indicating that someone had thrown it, skipping it off a sidewalk onto the grass. Expert testimony matched the pistol to sixteen spent casings found at the scene of the shooting. Of the individuals in the car, footprints found near the casings matched only defendant Williams, who rode on the passenger side of the backseat. Police found two handguns in the vehicle, one on the front floorboards where Elijah

¹ While Elijah Tillman was a co-defendant in the proceedings below, he did not participate in this appeal, so for purposes of this opinion, "Tillman" refers only to defendant Jack Tillman.

Tillman was sitting, and one on the backseat where Parker and Williams were. Police also found a ski mask and gloves on the backseat.

All three defendants argue that the trial court erred when it denied their motions for mistrial after a juror admitted that someone approached her at work and asked her to do all she could, insinuating that she should help acquit defendants. We disagree. A trial court should not grant a mistrial unless a prejudicial trial irregularity resulted in an unfair proceeding. *People v Alter*, 255 Mich App 194, 205; 659 NW2d 667 (2003). We review for abuse of discretion the trial court's decision to deny the motion. *Id.*

The juror stated that the contact was probably a chance encounter, that the man who approached her was not currently in court, and that he did not threaten her. The juror explained that she had mentioned to her fellow jurors that someone had contacted her about the case. She stated, "They asked me what was wrong with me, and I just said, I got contacted, and that was it." The juror admitted that she felt compromised, found it difficult to continue as a juror, and wanted to be excused. The trial court excused the juror and then questioned each of the remaining jurors. Although one juror admitted feeling slightly intimidated, all the jurors unequivocally affirmed that they could judge the case fairly on the basis of the evidence and that the incident would not influence their decision. Because of the brief and limited nature of the excused juror's communication to the remaining jurors' and their assertions that they would still reach a verdict based only on the law and facts, the trial court did not abuse its discretion when it decided that the remaining jurors' were impartial and would not allow the incident to affect their judgment.

Defendant Tillman argues that the trial court erred when it denied his motion for a new trial predicated on an ineffective assistance of counsel claim. We disagree. We review for abuse of discretion a trial court's denial of a motion for new trial. *People v Lemmon*, 456 Mich 625, 648 n 27; 576 NW2d 129 (1998). Tillman based his ineffective assistance argument on his attorney's erroneous stipulation that a prior felony conviction for marijuana possession satisfied the requirements for the felon in possession charge. In reality, Tillman's conviction was not severe enough to qualify as a "felony" under the felon in possession statute, MCL 750.224f, because it was not punishable by four years in prison. The trial court acknowledged this error in postjudgment proceedings and, accordingly, vacated Tillman's felon in possession conviction as well as the felony-firearm predicated on it. Nevertheless, Tillman argues that vacating the convictions did not cure the prejudice, because the erroneous stipulation informed the jury that he was convicted of some earlier, unnamed felony. We disagree.

A criminal defendant is entitled to a fair trial, not a perfect one. *People v Mosko*, 441 Mich 496, 503; 495 NW2d 534 (1992). In light of the strong evidence against him, Tillman fails to demonstrate that the jurors would have acquitted him of the other charges if only the trial court had not briefly and vaguely disclosed that he had an earlier felony conviction. *People v Poole*, 218 Mich App 702, 718; 555 NW2d 485 (1996). Also, juries are presumed to follow their instructions, *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998), and the trial court in this case reminded the jurors that they "must consider each crime separately in light of all of the evidence." Because knowledge of the earlier felony did not fatally impair the reliability of the jury verdict, the trial court did not abuse its discretion when it denied Tillman's motion for a new trial.

Tillman also makes issue of the trial court's decision to briefly exclude all spectators from the courtroom. A trial court's decision whether to close the proceedings to the public is reviewed for abuse of discretion. *Detroit Free Press, Inc v Recorder's Court Judge*, 409 Mich 364, 390; 294 NW2d 827 (1980). In this case, nobody objected to the brief closure, so the issue was not preserved for appeal. Therefore, our review is limited to whether the trial court committed plain error affecting Tillman's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). The trial court closed the proceedings to insulate the remaining jurors from any further, potentially intimidating, contact. It kept the court closed only during the brief, recorded, and eventless testimony of the last witness, a director of 911 services called by the defense apparently to create doubt about the events' timing. The trial court reopened the courtroom for closing arguments at the first request from the attorneys. Under these circumstances, the court's brief closure did not adversely affect Tillman's substantive rights.

Tillman next argues that he was denied a fair trial because the jury heard evidence that the two guns recovered from the white car were stolen and the gun thrown from the car had illegally changed hands several times. We disagree. We review for abuse of discretion a trial court's decision whether to admit evidence. *People v Bahoda*, 448 Mich 261, 288; 531 NW2d 659 (1995). Again, Tillman failed to raise this issue below, so we review this unpreserved evidentiary issue for plain error affecting his substantial rights. MRE 103; *Carines, supra*. The evidence regarding the guns' origins and histories related to the issues of possession and the shooter's identification. The jury could also infer that defendants used untraceable guns so police could not link them to their planned assault. Under these circumstances, the information represented a telling portion of the complete picture, *People v Sholl*, 453 Mich 730, 741-742; 556 NW2d 851 (1996), and the trial court did not commit plain error by allowing it into evidence.

Next, defendant Williams challenges the sufficiency and comparative persuasiveness of the evidence supporting his conspiracy conviction. To determine whether the evidence was sufficient, we review it "in the light most favorable to the prosecutor and determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt." *People v Fetterley*, 229 Mich App 511, 515; 583 NW2d 199 (1998). The victim saw a white car pass by him and then a tall shooter firing at him. The sixteen spent shell casings, direction of the shots, and expert testimony regarding the shooter's stance, confirm that the shooter intended to hit and kill the victim. Within seconds after the shooting, the victim's neighbor saw a darkly clad man get into the passenger side of a white car and speed off. Testimony from the victim and police agreed that police happened upon the scene moments after the shooting and saw a white car erratically speeding from the area. Police chased the car and later found, along the right side of the chase's route, the Luger that fired the shots. Williams' footwear matched footprints at the site where the spent casings were found, and his open window left him in a position to dispose of the Luger. He also tried to escape from the open window. This evidence strongly suggested that Williams shot the victim with the Luger and then threw it out the window during the chase.

Two stolen guns, a ski mask, and gloves were found in the car. These criminal tools, the waiting car, and the hasty retreat all suggest a common criminal purpose agreed upon between Williams and the driver, Tillman, before the shooting. The attempted flight of all the passengers suggests their role in the criminal conspiracy as well. *People v Compeau*, 244 Mich App 595, 598; 625 NW2d 120 (2001). Therefore, the overwhelming circumstantial evidence suggesting a

conspiratorial effort far outweighed the minor discrepancies and oddities on which Williams bases his challenge. It follows that the trial court correctly denied Williams' motion for a directed verdict and new trial based on the weight of the evidence against him. *People v Hampton*, 407 Mich 354, 368, 373; 285 NW2d 284 (1979).

Finally, Williams argues that the jury's indecision on the assault charge impugns its finding that he was guilty of conspiracy. We disagree. We find no inconsistency in a verdict finding a defendant guilty of conspiracy while not finding him guilty of the actual assault. Likely, the prosecutor failed to persuade the entire jury beyond a reasonable doubt that Williams, rather than Elijah Tillman, actually shot the victim. In any event, we will not upset the conspiracy conviction based on speculation about the jury's motives. *People v Casal*, 412 Mich 680, 688; 316 NW2d 705 (1982). Instead, we limit our review to whether the evidence supported the verdict. *Id.* Here the evidence demonstrated at bare minimum that Williams rode in the car to the site of the crime and remained there during the shooting; sat near a ski mask, a pair of gloves, and a pistol; probably threw the Luger out his window; and attempted to escape after the crash. Because this evidence alone sufficed to support the inference that he conspired to commit murder, we affirm his conviction.

Defendants Williams and Parker argue that the prosecutor failed to produce sufficient evidence to prove that they were guilty of felon in possession of a firearm. We disagree. Williams argues that the felon in possession claim fails for both technical and factual reasons, while Parker only challenges the factual element of possession. Because the evidence provided strong support for Williams' possession and disposal of the Luger, his factual challenge lacks merit.

Williams' bases his technical claim on the fact that he stipulated to the fact that he committed a "felony" as described in MCL 750.224f rather than requiring the prosecutor to prove every element of the offense. He does not contest that his prior conviction actually qualified as a "felony" under MCL 750.224f, which made his possession of a firearm a criminal offense. Instead, he argues that the several particular criteria for a qualifying "felony" represent separate elements of felon in possession, and the prosecutor neglected to prove each element.

Rather than reiterating the statute's "felony" criteria, the trial court merely explained in its jury instructions that the parties stipulated to each defendants' earlier felony conviction and further stipulated to its status as a "felony" that would support a felon in possession conviction. Williams now complains that the prosecutor failed to present facts that would support such a legal finding, and the trial court erred by failing to recount all the reasons the prior felony conviction qualified as a "felony" under the statute. We find this argument unpersuasive.

While parties may not effectively stipulate to the law, factual stipulations bind them. *Staff v Johnson*, 242 Mich App 521, 535; 619 NW2d 57 (2000). While the stipulation here represented a conclusion² of law drawn from the facts, the underlying law was accurate, never

² Williams asserts that the stipulated conclusion somehow interfered with the jury's opportunity to reject the separate stipulations to each factual criterion establishing the felony as one that qualified under the statute. This argument lacks merit. The jury remained free to disagree with
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disputed, and impeccably applied. Therefore, Williams essentially stipulated to the factual circumstances of the prior felony, so we will not reverse the jury's faultless decision to adopt the stipulation as fact. *People v Griffin*, 235 Mich App 27, 45-46; 597 NW2d 176 (1999).

Regarding Williams' insinuation that the trial court reversibly erred by failing to present all the crime's elements, we disagree. The tack taken by the trial court insulated Williams from the prejudice that would result from informing the jury that the prior felony was serious and recent. Because Williams made the stipulation for the very purpose of limiting the prejudice that disclosing his felonious past would cause, the stipulation amounted to a waiver of his right to expect the trial court to explain all the legal aspects of the charged crime. It also waived his right to demand that the prosecutor prove them. *Carines, supra* at 762 n 7. Moreover, the several criteria of a "felony" do not constitute elements of the charged crime, but various exceptions or excuses to its application. *People v Perkins*, ___ Mich App ___, slip op p 3; ___ NW2d ___ (Docket No. 243412, issued June 8, 2004); *People v Henderson*, 391 Mich 612, 616-617; 218 NW2d 2 (1974). If a defendant fails to raise such exceptions and excuses to firearms charges, the prosecutor need not separately disprove their application. MCL 776.20; *Perkins, supra*; *Henderson, supra*. This rule prevents defense counsel from springing such last minute trial, or appellate, defenses on a prosecutor. Because Williams did not raise (indeed, could not raise) any reason why his prior felony did not support a felon in possession conviction, his stipulation to the existence of the felony alone sufficed to support his felon in possession conviction. *Perkins, supra*.

Parker argues that his conviction for felon in possession was not supported by sufficient evidence because the prosecutor merely demonstrated that he was in the presence of firearms, not that he carried one. We disagree. The police found another pistol jammed in a locked position on the backseat where Williams and Parker sat, but the evidence suggested that Williams carried a Luger, used only the Luger in the shooting, and threw the Luger out his window during the chase. The evidence also showed that a driver's side door repeatedly opened during the chase, suggesting that Parker attempted to dispose of the gun or use it against his pursuers. The pursuing officer also testified that Parker initially attempted to escape through the driver's side door, but abandoned the attempt when the officer dragged Williams to the ground. *Compeau, supra*. From this evidence, a rational jury could reasonably conclude that Parker possessed the pistol at some point during the evening's events. *Fetterly, supra*; see also *People v Wolfe*, 440 Mich 508, 519-520; 489 NW2d 748 (1992).

Regarding Williams' argument that the trial court erred when it instructed the jury on felon in possession, we note that the trial court made a slip of the tongue when it advised the jury of this charge, referring to the "felon in possession" charge as "felony-firearm." Nevertheless, defendant failed to object. The trial court thrice repeated the correct name and instructions for the charge when it explained the charges against the co-defendants, and the verdict forms

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the entire stipulation with at least as much ground to do so as it would have had if the trial court recited all the statute's individual criterion and acknowledged a separate factual stipulation to each. Of course, that approach would have prejudiced Williams far more and undermined the entire purpose for the stipulation.

properly reflected the correct nomenclature. Therefore, the trial court's momentary slip did not affect Williams' substantial rights. *Carines, supra* at 763.

Affirmed.

/s/ Peter D. O'Connell

/s/ Pat M. Donofrio